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Title VII's Exemption for Religious Institutions: Constitutionally Required or Constitutionally Forbidden

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TITLE VII's EXEMPTION FOR RELIGIOUS INSTITUTIONS: CONSTITUTIONALLY REQUIRED OR CONSTITUTIONALLY FORBIDDEN?

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964, as amended,[1] proscribes discrimination in employment on the basis of race, color, religion, sex or national origin.[2] It prohibits discrimination in employment in both the private and public sectors;[3] the power of the enforcing agency, the Equal Employment Opportunity Commission (EEOC),[4] reaches all employers engaged in an industry affecting commerce[5] who employ at least fifteen employees.[6] There are, however, statutory exceptions[7] and one express exemption from the provisions of title VII.

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1. 42 U.S.C.A. § 2000e to e-17 (1974).

2. It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C.A. § 2000e-2(a) (1974).

3. As originally enacted in 1964, the Civil Rights Act did not apply to the public sector. In 1972, 42 U.S.C. § 2000e(a) was amended to include as "persons" covered under title VII, "governments, governmental agencies or political subdivisions." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103, *amending* 42 U.S.C. § 2000e(a) (1970).

4. 42 U.S.C. § 2000e-4 created the Equal Employment Opportunity Commission (EEOC) to serve as the Civil Rights Act's enforcing agency. Originally only empowered to make a recommendation to the Attorney General to intervene in an aggrieved individual's civil action, in 1972 the EEOC was granted the authority to, itself, intervene in a civil action brought under title VII by a private party against a party other than a government, governmental agency, or political subdivision. 42 U.S.C.A. § 2000e-4(g)(6) (1974).

5. The use of the broad "affecting commerce" standard reflects Congress' strong commitment to the social policy the Act represents. The same standard appears in other legislation impacting the employment arena. *See, e.g.*, Labor Management Relations Act, 29 U.S.C. §§ 141-97 (1970); Age Discrimination Act, 29 U.S.C. §§ 621-34 (1970); Occupational Safety and Health Act, 29 U.S.C. §§ 651-78 (1970).

6. The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . .

42 U.S.C.A. § 2000e(b) (1974). *Accord*, Williams v. New Orleans Steamship Association, 341 F. Supp. 613 (E.D. La. 1972); *see* Hassell v. Harmon Foods, Inc., 336 F. Supp. 432 (W.D. Tenn. 1971), *aff'd*, 454 F.2d 199 (6th Cir. 1972).

7. It should be noted that two exceptions from title VII significantly affect religious

The one exemption from the mandates of title VII appears in section 702 of the Civil Rights Act of 1964, as amended.[8] It provides, simply, that the nondiscrimination provisions of title VII will not be applied to religious institutions with respect to the employment of individuals of a particular religion for the performance of work connected with the activities of such institutions. Section 702 reads, in pertinent part:

> This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.[9]

The section thus carves out an exemption from title VII's coverage for a class of enterprises—those organized for religious purposes—which would otherwise come within the broad definition of "employer" under the subchapter. While section 702 does not permit discrimination on the basis of sex, color, race, or national origin, it does expressly permit an exempted enterprise to hire and employ employees using religion as a selection criterion, regardless of the nature of the job the employee is hired to perform.[10] Although section 702 does not grant an unlimited exemption to religious institutions, it has evoked serious con-

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organizations. One major exception permits the hiring and employment of employees on the basis of their religion, sex, or national origin for positions for which such qualities are bona fide occupational qualifications (BFOQs) reasonably necessary to the normal business operations of an enterprise. 42 U.S.C.A. § 2000e-2(e)(1) (1974). Neither race nor color can be considered a BFOQ. However, during consideration of the section in Congress, Senator Clark of Pennsylvania noted:

> Although there is no exemption in title VII for occupations in which race might be deemed a bona fide job qualification, a director of a play or movie who wished to cast an actor in the role of a Negro, could specify that he wished to hire someone with the physical appearance of a Negro—but such a person might actually be non-Negro. Therefore, the act would not limit the director's freedom of choice.

110 CONG. REC. 7217 (1964).

The second exception from title VII permits schools and other educational institutions which are supported or controlled by a particular religion to hire and to employ employees on the basis of that religion. 42 U.S.C.A. § 2000e-2(e)(2) (1974).

8. 42 U.S.C.A. § 2000e-1 (1974).

9. *Id.*

10. The limited exemption from coverage in this section [§ 702] for religious corporations, associations, educational institutions or societies has been broadened to allow such entities to employ individuals of a particular religion in all their activities instead of the present limitation to religious activities. Such organizations remain subject to the provisions of title VII with regard to race, color, sex, or national origin.

118 CONG. REC. 7167. *But see* McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 869 (1972). There the court found that a religious institution was, in effect, totally exempt from title VII requirements with respect to its transactions with its ordained ministers.

stitutional inquiry.[11] It is the purpose of this comment to demonstrate the unconstitutionality of section 702 on the ground that it violates the establishment clause[12] of the first amendment to the Constitution.

II. The Extent of Free Exercise Protection Granted to a Religious Institution

A determination of the extent of the free exercise protection[13] accorded a religious institution is necessary to reach the issue of the constitutionality of section 702. The extent of this protection will determine the degree to which an exemption from title VII is constitutionally required. If all activities of a religious institution are found to be constitutionally immune from all attempts at government interference, then it would be unconstitutional not to exempt them from the nondiscrimination provisions of title VII with respect to sex, color, race, and national origin. Similarly, if only some activities are to be fully protected, or if all activities are to be only partially protected, an accommodation to the mandates of title VII would need to be fashioned by means of a properly formulated exemption. In essence, the failure to appropriately exempt would force a religious organization to affirmatively comply with certain provisions of title VII which would, in turn, interfere with its free exercise of religion.

An analysis of the extent of the free exercise clause protection granted to religious institutions entails two separate inquiries. First, what is the *nature* of the protection granted under the free exercise clause? That is, does establishing a nexus between a religious institution's doctrine and its activities immunize the institution from liability for discrimination on bases other than religion? Second, what are the *limits* of the free exercise clause protection? That is, what kinds of activities can a religious institution rightfully claim fall within the category of religious activities deserving constitutional protection?

A. The Free Exercise Right of a Religious Institution

That religious enterprises, like persons, have a constitutional right to the free exercise of their religion was firmly established in *Kedroff v. St.*

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11. *See* King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974).

12. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

13. "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. CONST. amend. I.

Nicholas Cathedral.[14] The *Kedroff* case extended a judicial policy first established in *Watson v. Jones*[15] where the Supreme Court refrained from deciding anew which of two factions of the Presbyterian Church was entitled to control certain real property. Instead, the Court claimed it was bound by the ruling of the highest ecclesiastical body of the Presbyterian Church, saying it would be so bound in all instances where the issue to be decided involved a question of church discipline, faith, ecclesiastical law, rule, or custom.[16]

Kedroff involved the validity of a New York statute which had the effect of transferring administrative control of the Russian Orthodox Church in North America from Moscow to an authority selected by a conference of American churches. The Supreme Court found the statute an unconstitutional interference with the Church's free exercise of religion, holding that "[l]egislation that regulates church administration, the operation of churches, [or] the appointment of clergy . . . prohibits the free exercise of religion."[17]

In the years following *Kedroff*, the Supreme Court has acknowledged the constitutional dimension of the policy of *Watson*, where no specific legislation was involved, by upholding the right of religious institutions to first amendment protection from judicial interference with religious free exercise in those circumstances which would require inquiry into issues of doctrine for the purpose of a judicial determination.[18] In *Bodewes v. Zuroweste*[19] a state court indicated, however, that issues not involving doctrine were not to be shielded from judicial scrutiny and redress. In *Bodewes*, a priest sued his bishop for breach of the salary provision of his employment contract. The court asserted jurisdic-

14. 344 U.S. 94 (1952).

15. 80 U.S. (13 Wall.) 679 (1871).

16. In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which this matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application of the case before them.

Watson v. Jones, 80 U.S. (13 Wall.) at 727. *Watson* has been cited for over one hundred years for the rule of non-interference where civil authorities would be required to use religious doctrine as the criterion for a judicial determination. *See, e.g.*, Simpson v. Wells Lamont Corp., 494 F.2d 490, 493 (5th Cir. 1974).

17. 344 U.S. at 107-08.

18. *See* Maryland & Virginia Eldership of the Churches of God v. Church of God, Inc., 396 U.S. 367 (1970); Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church, 393 U.S. 440 (1969); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960).

19. 303 N.E.2d 509 (Ill. Ct. App. 1973).

tion over the dispute saying: "It was not the intent of [the first] amendment . . . that civil and property rights should be unenforceable . . . because the parties involved might be the church and members, officers, or the ministry of the Church."[20]

B. *McClure v. Salvation Army*

McClure v. Salvation Army[21] directly challenged, on free exercise grounds, the applicability of title VII to a religious organization. The court's analysis dealt specifically with the issues of the limits and the nature of the protection granted under the free exercise clause.

Mrs. Billie McClure, an officer and minister of the Salvation Army, brought suit against the Army as her employer, claiming a violation of title VII. By its express provisions at the time, section 702[22] permitted a religious institution to discriminate on the basis of religion with respect to employment related to its religious activities. But it was Mrs. McClure's contention that the Salvation Army had unlawfully discriminated against her on the basis of sex. She claimed, among other things, that she had received less compensation and fewer benefits than had her male counterparts in the organization.[23] The Salvation Army, not refuting the substance of Mrs. McClure's allegations, maintained that the court was without jurisdiction to hear the case.[24] The Army argued that it was not an employer and that Mrs. McClure was not an employee under the Civil Rights Act. The Army went on to assert that even if the court found the parties to fall within the definitions of title VII, it would be totally exempt, under section 702, from compliance with the provisions of title VII. Essentially the Army was claiming free exercise

20. *Id.* at 511.

21. 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

22. At the time the case arose, the section 702 exemption read as it was originally enacted in 1964, not as it was amended in 1972. During the *McClure* litigation section 702 provided in relevant part:

> This title shall not apply . . . to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its *religious activities* . . . .

Act of July 2, 1964, Pub. L. No. 88-352, title vii, § 702, 78 Stat. 255 (emphasis added). The "religious activity" language framed for the *McClure* court the issue of the limits and nature of the freedom of religion required under the free exercise clause. Despite the variance from the present language, the examination of the constitutionality of section 702 remains relevant since the court decided the case on the basis of the constitutional protection that is generally extended to a religious enterprise.

23. 460 F.2d at 555.

24. *Id.*

protection on all bases, *i.e.*, religion, race, sex, color and national origin, with respect to the carrying on of its religious activities.

The court found that it had jurisdiction under the Act over the Salvation Army as an employer and over Mrs. McClure as an employee. It then held that there was no overall statutory exemption from title VII for religious institutions.

> The language and legislative history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.[25]

Finding no statutory exemption from the dictates of title VII, the court next considered whether the obligations imposed on a religious institution by title VII were violative of the Constitution. It concluded, without deciding the full extent of free exercise protection accorded to a religious institution, that at least the relationship between a church and its minister was constitutionally immune from the dictates of title VII. The court said:

> The relationship between an organized church and its ministers is its life-blood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.[26]

The court appeared to be adopting the *Watson* and *Kedroff* position of defining certain actions of a religious institution as "doctrinal" and then refraining from interfering with those actions.[27] In *Watson*, the activities the court found deserving of constitutional protection were inextricably tied to ecclesiastical matters. And in *Kedroff*, the statute which was invalidated had been enacted because the state legislature determined it was necessary in order to "most faithfully carry out the purposes of [a] religious trust"—a determination involving doctrinal considerations.[28] The court's position in *McClure* is also in accord with

25. *Id.* at 558.

26. *Id.* at 558-59. The justification for the court's position appears to be based on the sanctity of the relationship between a church and its minister. *But see* Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church, 393 U.S. 440 (1969); Maryland & Virginia Eldership of the Churches of God v. Church of God, Inc., 254 A.2d 162 (Md. Ct. App. 1969), *appeal dismissed*, 396 U.S. 367 (1970), where the courts asserted jurisdiction in disputes between a parent church and its subsidiary, arguably an equally intimate relationship.

27. 460 F.2d at 559. *But see* Bodewes v. Zuroweste, 303 N.E.2d 509 (Ill. Ct. App. 1973); text accompanying note 19 *supra*. There the court expressly did not extend free exercise protection to civil matters in which a religious institution was involved.

28. 344 U.S. at 109.

the Supreme Court's holding in *Gonzalez v. Roman Catholic Archbishop*.[29] There the Court refused to interfere with the decision of the Archbishop of Manila not to appoint the petitioner to a chaplaincy, stating:

> Because the appointment is a canonical act, it is the function of the Church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them.[30]

However, the court went a step further in *McClure*. It extended the protection of the free exercise clause to matters peripheral to what would appear to be the ecclesiastical dimensions of the church-minister relationship:

> Just as the initial function of selecting a minister is a matter of church administration . . . so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.[31]

Whether *McClure* can be interpreted as extending the limits of free exercise protection to include all employment relationships involving religious activities is an open question. The court seemed to indicate that such an interpretation is warranted. It cited the *Kedroff* decision and others as evidencing:

> "[A] spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[32]

Supporting this interpretation is *King's Garden, Inc. v. FCC*,[33] where both *Kedroff* and *McClure* were cited for the principle that the first amendment requires the application of section 702 to the "religious activities" of a religious institution. The court did not explain, however, its interpretation of either the *McClure* decision or the "religious activities" language of section 702 as it existed at the time of *McClure*.

In addition to extending the limits of the free exercise clause protection to include a seemingly nondoctrinal category of activities, the

29. 280 U.S. 1 (1929).

30. *Id.* at 16. The chaplaincy involved in *Gonzalez* was a position established by an individual, by will, for the purpose of having a certain number of masses celebrated annually. The Archbishop, applying religious, educational, and age criteria, found that the young man claiming the chaplaincy under the will was not qualified for the position. *Id.* at 17.

31. 460 F.2d at 559.

32. *Id.* at 560, *quoting* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).

33. 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974).

McClure court extended the nature of free exercise protection.[34] Not only must a religious institution be permitted to discriminate on the basis of religion within this ill-defined category of protected religious activities, it must also be permitted to discriminate on whatever other bases it deems necessary. The provisions of title VII cannot be applied *at all* to certain protected relationships and their "penumbral" activities within a religious institution.[35] Mrs. McClure, as a minister of the Salvation Army, had no protection, therefore, under title VII for actions which discriminated disadvantageously against her on the basis of her sex. It is important to note that while *McClure* significantly expanded the free exercise protection guaranteed to a religious organization, it did not find title VII unconstitutional for imposing certain nondiscrimination provisions on religious institutions. Instead, it held

> that Congress did not intend, through the non-specific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister.[36]

An amicus curiae brief filed by the EEOC on behalf of Mrs. McClure took issue with the (anticipated) breadth of the court's decision. Its position was that the first amendment's restriction on legislative and

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34. Admittedly, it is difficult in many situations to differentiate the expansion of the category of protected relationships or activities, *i.e.*, the limits of protection, from the nature of the protection being granted. Where the first amendment is held to protect seemingly nonecclesiastical matters, it may be enlarging the category *and* affording protection of a new kind. The following illustrations are intended to clarify the distinction.

It has been established that the decision of a bishop not to appoint a chaplain who admits he or she is an atheist would be immune from judicial interference because it involves making a determination on *religious grounds* for a position intimately *connected with religious activities.* However, if a bishop did not permit a black person to assume a chaplaincy because he or she was Black (no tenet of the church mandating exclusively Caucasian chaplains) and the court declined to consider the issue, it would be granting first amendment protection of a nonreligious *nature.* This is analogous to Mrs. McClure's charge of sex discrimination and the court's disposition of her claim. Finally, if a civil contract for employment of a chaplain were breached and a court refused to exercise its jurisdiction to hear the dispute claiming it was a protected transaction under the first amendment, the court would be enlarging the *category* of activities to which it granted constitutional protection, thus extending the limits of that protection. This is possibly analogous to the inclusion of the setting of a minister's salary as a protected activity in *McClure.*

35. We find that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.

McClure v. Salvation Army, 460 F.2d 533, 560 (5th Cir.), *cert. denied,* 409 U.S. 896 (1972).

36. *Id.* at 560-61.

judicial interference with religion extends only to prohibiting the state from interpreting tenets of faith or doctrine. Therefore, issues of salary and job placement—even of ministers—would not fall within the first amendment's protection.[37]

This position is now being asserted by Betty Boone Schiess, one of the recently ordained women Episcopalian priests. In August of 1975, Ms. Schiess filed complaints with the New York State Division of Human Rights and the EEOC charging Bishop Ned Cole with unlawful discrimination on the *basis of sex* for not permitting her to perform the *religious activities* normally performed by a priest. According to the national magazine which reported her action,[38] Ms. Schiess' complaints contend that "secular laws permitting a church to practice discrimination in employment are meant to exclude only persons who do not share its beliefs."[39]

Ms. Schiess' objection to title VII parallels that of Mrs. McClure; they both focus directly on the nature of the first amendment protection afforded religious institutions in their dealings with their religious leaders. The case could result in a determination of the full scope of a religious institution's constitutional immunization from title VII.

C. *Section 702, As Amended*

A consideration of the *McClure* case is only the first step in an analysis of the extent of a religious institution's constitutional immunity from title VII. When *McClure* was decided in 1972, section 702 shielded a religious institution from liability for discrimination on the basis of religion with respect to employment involved with the institution's religious activities.[40] Later that year, section 702 was amended to provide a broader exemption for religious institutions from title VII:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation,

37. "A decision on the merits in this case simply does not require the trial court to weigh the federal interest in Title VII against a conflicting religious doctrine, nor evaluate any of the Salvation Army's theology." Brief for EEOC as Amicus Curiae at 28, McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

38. TIME, Aug. 18, 1975, at 36.

39. *Id.* The jurisdictional requirements of title VII do not provide for the filing of a civil action under the section before the expiration of one hundred and eighty days from the filing of a charge with the EEOC. 42 U.S.C.A. § 2000e-5(f) (1974). The EEOC charge is not considered to be filed until sixty days after proceedings are commenced under the state law. 42 U.S.C.A. § 2000e-5(c) (1974). Therefore a decision in the Schiess case will not be quickly forthcoming.

40. *See* note 22 *supra*.

association, educational institution, or society with respect to the employment of individuals *of a particular religion* to perform work connected with the carrying on by such corporation, association, educational institution, or society *of its activities*.[41]

The *McClure* court found that total protection—*i.e.* on *all bases* recognized in title VII—is required under the free exercise clause for the still undefined category of religious activities of a religious institution. But, because of the formulation of the section 702 exemption at the time, it never reached the issue of whether or not such protection, *or any protection*, is constitutionally extended to *all activities* of a religious institution.

The only case to consider this issue is *King's Garden, Inc. v. FCC*.[42] In *King's Garden*, the petitioner was a religious non-profit charitable association whose organization included a number of ministeries. King's Garden was also the licensee of two radio stations which broadcasted predominantly religious and inspirational programming. In its suit against the Federal Communications Commission (FCC), it maintained that the policy of the broadened section 702 exemption was to be superimposed onto the FCC's anti-bias rules, thereby permitting the radio station to discriminate on religious grounds with respect to the hiring and employment of all its employees. King's Garden's position was that the broad exemption was necessary in order for the organization to pursue its religious goals.[43] Although admitting on one hand that some of the organization's activities could be performed by nonreligious persons,[44] it asserted on the other that each of its employees performed an essential role in the religious mission of King's Garden.[45] It followed, therefore, that in order to be qualified for employment at King's

41. 42 U.S.C.A. § 2000e-1 (1974) (emphasis added).

42. 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974).

43. Brief for Petitioner at 29, King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974) [hereinafter cited as Brief for Petitioner]. It is interesting to note that King's Garden's original claim to the FCC maintained that it was proper, under title VII's BFOQ exception, 42 U.S.C.A. § 2000e-2(e)(1) (1974), to impose a religious requirement on its applicants and employees. However, in its brief to the Court of Appeals, King's Garden expressly conceded that although it believed that all of its employees were carrying out an essentially religious mission, "they may be engaged in activities that can be performed by non-religious persons." *Id.* at 25. The statutory standard under title VII for a BFOQ exception requires the challenged selection criterion to be "reasonably necessary to the normal operation of [a] particular business or enterprise." King's Garden's admission clearly refuted its prior contention that religion would qualify as a BFOQ, and by the time the case reached the court, the claim had been abandoned.

44. Brief for Petitioner, *supra* note 43, at 25.

45. *Id.* at 29.

Garden, an applicant or an employee must be sympathetic to its basic philosophy.[46] The application of the narrow FCC exemption, instead of the broad section 702 exemption, would inhibit the hiring of qualified—*i.e.* properly sympathetic—employees. This inhibition, King's Garden claimed, would violate the organization's rights under the free exercise clause.[47]

> Insofar as the state requires a religious organization to employ persons not in sympathy with its basic philosophy, it is hampering and burdening the right of that organization to pursue its religious activities according to its beliefs. It was the recognition of this basic fact—that the secular and the divine cannot be compartmentalized—that prompted Congress to expand the religious exemption of the Civil Rights Act to all activities of a religious organization.[48]

The court rejected the position of King's Garden, stating that the myriad "activities" which would be immunized were section 702 applied by the FCC "have not the slightest claim to protection under the Free Exercise . . . guarantees."[49]

Another analysis of *King's Garden* has suggested that, following *Wisconsin v. Yoder*,[50] a broad section 702 exemption is required to permit a religious institution to use "its own resources to shield its members from the importunities of the secular world or of competing

46. *Id.* at 25. The briefs filed by the Federal Communications Commission and by the American Civil Liberties Union Foundation of Northern California, Inc., and the Office of Communication of United Church of Christ, amici curiae on behalf of Respondents in *King's Garden*, noted that a distinction should be made between religious "belief" and religious "conduct." Citing Braunfeld v. Brown, 366 U.S. 599 (1961) and Cantwell v. Connecticut, 310 U.S. 296 (1940), the briefs noted that conduct which is motivated by religious belief may be regulated but that belief, alone, may not be. They suggested that an exemption for religious institutions, less broad than section 702, would be regulating religion-motivated conduct, and not the belief itself. Brief for Respondents at 24, King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974); Brief for American Civil Liberties Union Foundation of Northern California, Inc. and Office of Communication of United Church of Christ as Amici Curiae at 5, King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 966 (1974). As to what constitutes a religious belief or activity, see Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965); United States v. Ballard, 322 U.S. 78 (1944); Follett v. McCormick, 321 U.S. 573 (1944).

47. *Id.* It should be noted here that the FCC rule resembles the original version of section 702 in that the exemption grants freedom to choose employees on the basis of religion for an activity of a strictly religious nature—on-the-air espousal of religious philosophy.

48. Brief for Petitioner, *supra* note 43, at 25.

49. 498 F.2d at 56.

50. 406 U.S. 205 (1972).

faiths."[51] But the circumstances of the Amish sect in *Yoder* were highly unusual.[52] The desire of the Amish to shield themselves from the secular world was based on their long-established religious beliefs, and was considered by the Court to be essential to the preservation of their religion.[53] Not so in *King's Garden* or in most contemporary situations where, although the employer is a religious institution, the employees spend their non-working hours in the secular world. "Thus," said the Supreme Court in *Yoder*,

> if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, *their claims would not rest on a religious basis.* Thoreau's choice was philosophical and personal rather than religious, and *such belief does not rise to the demands of the Religion Clauses.*[54]

D. Other Social Legislation and the Free Exercise Clause

An analysis of the exemptions given to religious institutions by social legislation other than the Civil Rights Act of 1964, as amended,[55] is instructive in determining the extent of free exercise protection such institutions require.

The Fair Labor Standards Act[56] (FLSA) is the federal enactment of most general application affecting workers' wages and hours. It applies to employees or to enterprises engaged in interstate commerce or in the production of goods for interstate commerce. Religious corporations or other institutions which meet the commerce criterion[57] and which may

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51. Note, *The Constitutionality of the 1972 Amendment to Title VII's Exemption for Religious Organizations*, 73 MICH. L. REV. 538 (1975).

52. "Their rejection of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society." 406 U.S. at 217.

53. Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets from a subjective point of view. It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

Id. at 218.

54. *Id.* at 216 (emphasis added).

55. 42 U.S.C.A. § 2000e to e-17 (1974); *see* notes 1-10 *supra.*

56. 29 U.S.C. §§ 201-16 (1970).

57. The Fair Labor Standards Act does not extend to employees or enterprises which merely affect commerce and so excludes commerce of an inconsequential volume from its

be subject to a dollar volume requirement[58] are enterprises which are covered by the Act.

In *Mitchell v. Pilgrim Holiness Church Corp.*,[59] a challenge was made to the FLSA's applicability to a religious corporation. The Court of Appeals, in holding the Act applicable, stated:

> It seems clear, in the instant case, that the Fair Labor Standards Act is such a reasonable, nondiscriminatory regulation by an Act of Congress, a regulation in the interests of society for the welfare of all workers, . . . [that it] does not violate the Constitutional provisions guaranteeing the free exercise of religion.[60]

The FLSA has been interpreted, however, by the Federal Wage and Hour Administration, as exempting from its provisions eleemosynary, educational, religious and similar *activities* of organizations operated not for profit.[61]

The Occupational Safety and Health Act of 1970[62] (OSHA) requires each covered employer to provide a place of employment free from hazards likely to cause serious injury or death. It does not expressly exempt religious institutions from its provisions. The Department of Labor, two years after OSHA's enactment into law, clarified the policy regarding the Act's power over such institutions:

> Churches or religious organizations, like charitable and non-profit organizations, are considered employers under the Act where they employ one or more persons in *secular activities.* As a matter of enforcement policy, the performance of, or participation in, *religious services* (as distinguished from secular or proprietary activities whether for charitable or religion-related purposes) will be regarded as not constituting employment under the Act.[63]

The National Labor Relations Act[64] (NLRA), originally enacted in

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regulation. Noonan v. Fruco Const. Co., 140 F.2d 633 (8th Cir. 1943); Couch v. Ward, 168 S.W.2d 822 (Ark. 1943).

58. 29 U.S.C. § 203(s)(4) exempts from the dollar volume requirement ($250,000 annual gross volume of sales) certain non-profit hospitals, other institutions for the ill, and a broad category of schools. The enumerated enterprises are automatically deemed to be activities performed for a business purpose for a determination of whether or not they qualify as covered enterprises.

59. 210 F.2d 879 (7th Cir. 1954).

60. *Id.* at 885.

61. *See, e.g.*, Wage and Hour Opinion Letter No. 927, May 29, 1968, CCH WAGES-HOURS ¶ 25,195.69; Wage and Hour Opinion Letter No. 1037, December 31, 1969, CCH WAGES-HOURS ¶ 25,185.022.

62. 29 U.S.C. §§ 651-78 (1970).

63. 29 C.F.R. § 1975.4(c)(1) (1975) (emphasis added).

64. 29 U.S.C. § 141 *et seq.* (1970).

1935 and subsequently amended by the Taft-Hartley Act in 1947,[65] changed the nature of industry in the United States by legislatively protecting the trade union movement.[66] To best effectuate the Act's broad social policy, the jurisdiction of the Act's enforcing agency, the National Labor Relations Board, was made co-extensive with that of the commerce clause. There is no express exemption for religious institutions under the Act and, as a general rule, the Board will exercise jurisdiction over a religious institution when its "purely commercial activities" affect commerce.[67] The motivation of the institution, *i.e.* support of its religious activities, is immaterial to the Board's assertion of jurisdiction where the enterprise affects commerce.[68]

The most well-known benefit a religious organization enjoys, but which is denied to its secular counterpart, is its exemption from taxation.[69] However, where a religious organization organized and operated exclusively for religious purposes achieves business income *unrelated to its religious activities*, such income will be taxed.[70]

65. Labor Management Relations Act, 29 U.S.C. §§ 141-97 (1970).

66. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

67. Ming Quong Children's Center, 210 N.L.R.B. No. 125; 86 L.R.R.M. 1254, 1256 (1974); *see* Good Foods Manufacturing & Processing Corp., 195 N.L.R.B. 418 (1972); First Church of Christ, Scientist, 194 N.L.R.B. 1006 (1972). *But cf.* Lutheran Church, Missouri Synod, 109 N.L.R.B. 859 (1954) where the Board did not exercise jurisdiction over a church owned and operated radio station on a Lutheran seminary campus saying it would not decide whether or not the station engaged in interstate commerce. (Two dissenting Board members found that it was an instrumentality or channel of interstate commerce.) Instead, the Board merely asserted that the policies of the Act would not be effectuated by the assumption of jurisdiction over an organization which operated on a non-profit basis in connection with, and in furtherance of, its religious objectives.

68. First Church of Christ, Scientist, 194 N.L.R.B. 1006, 1008 (1972).

69. INT. REV. CODE OF 1954, § 501(c)(3). The rationale behind the government grant of tax exemptions to religious and similar organizations was expressed by the court in Christian Echoes National Ministry, Inc. v. United States, 470 F.2d 849, 853-54 (10th Cir. 1972):

> The exemption to corporations organized and operated exclusively for charitable, religious, educational or other purposes carried on for charity is granted because of the benefit the public obtains from their activities and is based on the theory that: ". . . the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare."

H.R. REP. No. 1860, 75th Cong., 3d Sess. 19 (1939).

70. INT. REV. CODE OF 1954, §§ 511-12. In Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972), a Florida statute was challenged on first amendment grounds for granting a tax exemption for church property used as a commercial parking lot. Before the case reached the Supreme Court, the law was changed to permit an exemption for church property only when it is used predominantly for religious purposes. The Supreme Court, with Justice Douglas dissenting, held that the issue had become moot. No similar case has subsequently arisen to test the practice of granting only limited (*i.e.*, for religious activities) tax exemptions to religious institutions.

Under the Internal Revenue Code then, and under each piece of major legislation cited above, religious institutions are granted limited exemptions from the obligations imposed on all other affected employers—exemptions which shield only the *religious activities* of the religious institutions. Challenges made to the limited exemptions, on the basis of legislatively denying a religious institution free exercise protection, have consistently failed.[71] By providing an exemption for all activities of a religious institution, title VII's section 702 is inconsistent with the treatment traditionally afforded such institutions by Congress. This lends support to a thesis that section 702 grants to religious institutions more freedom of religious exercise than is actually required under the Constitution.

E. The Balancing Test Under the Free Exercise Clause

In the final analysis, a religious institution's claim to free exercise protection must be balanced against society's competing interest which would deny such protection. Where religious claims prevail, they will be deemed to be deserving of constitutional protection.

The standard by which the government's interest is measured against the claimed right of free exercise has been described in terms of "a compelling state interest."[72] In *Wisconsin v. Yoder*,[73] speaking of the weight to be given to the conflicting considerations, the Supreme Court stated: "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[74] Thus, where conduct in accordance with religious beliefs interferes with compelling societal interests (usually in the form of a legislative mandate), religious conduct may be legitimately subject to restriction.[75] Or, to put it another way, religious interests, in those circumstances, are not entitled to constitutional protection.

The state has met its burden in the past and has consequently been permitted to enforce its laws despite infringement on the right to free exercise: where public safety required prohibiting children from selling

71. *See, e.g.*, cases cited at notes 59, 67, 68 & 70, *supra*.
72. Sherbert v. Verner, 374 U.S. 398, 403, 406 (1963).
73. 406 U.S. 205 (1972).
74. *Id.* at 215.
75. Here the conflict is between a legislative exemption representing the religious interest and a legislative mandate as applicable to the rest of society and, presumably, serving its interests.

religious literature in the streets;[76] where public welfare mandated upholding Sunday closure laws despite impairment of Orthodox Jews' livelihoods;[77] where morality compelled outlawing polygamy despite its mandate in religious doctrine;[78] and where public health necessitated ordering vaccinations for public school children against parents' religious objections.[79] In each of these cases, the prevailing state interest was one of broad social policy with widespread impact on society's health, safety or welfare.

In contrast, the government failed to make an adequate showing in *Sherbert v. Verner*,[80] where eligibility for state unemployment benefits was held not to depend on an applicant's availability for work on Saturday, and in *Yoder*, where public school attendance up to the age of sixteen was not enforced when it would have had a detrimental effect on the survival of the Amish religious community. In *Sherbert*, the resultant impact of the invalidation of the challenged legislation on society's health, safety, or general welfare was minimal. In *Yoder* this was not true, the state's interest in compulsory education being as broad and compelling a social policy as any on which the government has prevailed. However, in *Yoder*, the state's interest was outweighed by the possibility of destruction of an entire religious community—not just an incidental interference with free exercise of religion.[81] Further, it was tempered by the recognition that the state's objectives in compulsory education would be "otherwise served" by the substantially similar goals of the Amish community.[82]

Of the two categories of free exercise clause cases described above, the former seems to more accurately represent the balancing of interests involved in a determination of the requisite breadth of the section

76. Prince v. Massachusetts, 321 U.S. 158 (1944).

77. Braunfeld v. Brown, 366 U.S. 599 (1961).

78. Reynolds v. United States, 98 U.S. 145 (1878).

79. Board of Educ. v. Maas, 152 A.2d 394 (N.J. Super. Ct. 1959), *cert. denied*, 363 U.S. 843 (1960).

80. 374 U.S. 398 (1963).

81. "As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining Amish community and religious practice as they exist today . . . ." 406 U.S. at 218.

82. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief.

Id. at 225.

702 exemption. The intent of title VII was to provide all qualified persons equal access to all employment opportunities.[83] Clearly, equal employment opportunity represents a governmental interest of the highest order[84] and few doubt that this goal can be reached absent enforcement of title VII. The broad exemption for religious institutions enacted in section 702 permits such institutions to deny equal employment opportunity by discriminating on the basis of religion with respect to employment for positions which have no actual connection with the religious function of the institution. Consequently, were religious institutions denied the freedom to so discriminate, they would be suffering minimal interference—if any—with the carrying on of the religious aspects of their work or with the achievement of their religious goals. Balancing this minimal interference with religion against an expanded opportunity for equal employment, it is this writer's position, based on the review of cases herein[85] that the state's interest should prevail.

Section 702 presently protects activities heretofore denied protection legislatively[86] (*viz.*, unrelated to religious activities) and judicially[87] (*viz.*, unrelated to doctrinal issues or ecclesiastical matters). It protects activities the protection of which denies a compelling government interest. Therefore, it is submitted that section 702 grants to a religious institution more protection than is required under the free exercise clause.

III. Religious Institutions and the Establishment Clause

That section 702 grants more freedom of religious exercise to religious institutions than is required under the Constitution does not mean that the exemption is unconstitutional per se. A complete constitutional analysis must necessarily include a balancing of the competing claims of the establishment clause against the grant of free exercise as applied under section 702. The extent to which each interest will be accommodated depends upon the nature of the competing interests and their place in the constitutional hierarchy.

83. One of the basic principles of our way of life in America has always been that individuals would be free to pursue the work of their own choice, and to advance in that work, subject only to considerations of their individual qualifications, talents and energies.

Statement by President Richard M. Nixon upon the signing into law the Equal Employment Opportunity Act of 1972, *quoted in* Equal Employment Opportunity Comm'n, Laws and Rules You Should Know, 2.

84. *See* note 74 *supra.*

85. *See* notes 31-33 *supra* and accompanying text.

86. *See* notes 56, 62, 64 & 69 *supra.*

87. *See* notes 14-19 *supra.*

A. *King's Garden v. FCC*

The free exercise clause protects an individual's (or institution's) right to freedom from state interference with the exercise of religion. The establishment clause assures that the state will do nothing to inhibit that free exercise.[88] But the establishment clause also mandates that the state not support or sponsor religion in any way.[89]

The establishment clause, in Jefferson's words, was intended to erect a "wall of separation between Church and State";[90] when the state touches the religious sphere, it must be evenhanded and neutral in its operation.[91] It must maintain a position of neutrality between believers and non-believers and between competing groups of believers.[92] But the establishment clause is not so inflexible as to fail to recognize the impossibility, in our complex and highly regulated society, of maintaining the total separation of church and state. And so it permits religion to "incidentally benefit" from specific acts of the government so long as the government's action meets the three-part test developed by the Supreme Court over years of dealing with establishment clause cases. As most recently expressed in *Committee For Public Education & Religious Liberty v. Nyquist*,[93] the test requires:

1) That the challenged law reflect a clearly secular legislative purpose;[94]

2) That the law have a primary effect which neither advances nor inhibits religion; and[95]

3) That application of the law not result in excessive entanglement of the government with religion.[96]

The establishment clause and the free exercise clause work in conjunction with one another within the parameters of the first amendment. They function cooperatively although they are not perfectly intermeshing parts of a defined whole. Religion can be afforded more protection

88. Lemon v. Kurtzman, 403 U.S. 602 (1971); School Dist. v. Schempp, 374 U.S. 205 (1963); Everson v. Board of Educ., 330 U.S. 1 (1947).

89. Lemon v. Kurtzman, 403 U.S. 602 (1971).

90. 8 JEFF. WORKS 113, *quoted in* Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

91. Gillette v. United States, 401 U.S. 437, 450 (1971).

92. Everson v. Board of Educ., 330 U.S. 1 (1947). *Cf.* King's Garden, Inc. v. FCC, 498 F.2d 51, 56 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974), where the court comments: "Because the two religion guarantees often seem to tug in opposite directions, 'neutrality' is a notoriously difficult concept."

93. 413 U.S. 756 (1973).

94. *Id.* at 773.

95. *Id.*

96. *Id.*

than it actually requires under the free exercise clause without causing a concomitant violation of the establishment clause.[97] But there exists a point at which accommodation of free exercise impinges on the rights guaranteed under the establishment clause. Whether or not this is the situation under section 702 was the issue addressed in *King's Garden*.[98]

The petitioner in *King's Garden* was a religious organization which was the licensee of two radio stations broadcasting predominantly religious and inspirational programming. An applicant for employment with one of the radio stations, Mr. Trygve J. Anderson, was asked to complete a job application which required him to respond to questions directly pertaining to his religious beliefs and practices.[99] Mr. Anderson registered a letter of complaint with the FCC; it eventually led to litigation in both administrative and judicial forums.[100] The letter claimed that the questions contained in the application were being used to discriminate against potential employees on improper grounds.[101]

The FCC considered Mr. Anderson's claim in light of the Commission's guidelines which exempt sectarian licensees from the public interest anti-bias rules with respect to employment "connected with the espousal of the licensee's religious views."[102] Using this standard, the Commission found King's Garden to be in violation of the rules. Since not every position with the radio station required an employee's espousal of King's Garden's religious views, a pre-employment screening criterion based on religion was unnecessary and improper. The Commission so informed King's Garden by letter, but before the Commission took any final action against its licensee, Congress passed the 1972 amendment to section 702.

In response to the Congressional action, King's Garden asked the Commission to change its ruling, claiming that under title VII's new section 702, a religious institution was exempt from liability for discrimination on religious grounds with respect to employment for positions

97. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

98. King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974).

99. The application asked an applicant to respond to questions such as: "Are you a Christian?" "How do you know you are a Christian?" "Is your spouse a Christian?" and "Give a testimony." Brief for Respondents, *supra* note 45, at 4.

100. *In re* Complaint by Anderson, 34 F.C.C.2d 937 (1972); *In re* Request of National Religious Broadcasters, 43 F.C.C.2d 451 (1973), *aff'd*, King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974).

101. Brief for Petitioners, *supra* note 43, at 4.

102. *See* note 100 *supra*; the FCC's anti-bias rules appear in 47 C.F.R. § 73.301 (1969).

connected with all of its activities.[103] If this were so, King's Garden's employment application questions relating to religion would be appropriate and valid screening criteria for all positions in the radio station. The Commission, not disputing the meaning of the broadened section 702 exemption, replied that the Civil Rights Act was not part of its enabling statute and that the change in section 702's coverage had no effect at all on its rules and policies.[104] When the case was filed in the Court of Appeals, the petitioner asking for a review of the FCC order, the question presented was whether or not Congress intended title VII to superimpose its anti-discrimination provisions upon the FCC's existing anti-bias rules. But the three-judge court did not confine itself to simply answering the question presented;[105] it proceeded to analyze the scope and constitutional validity of the amended section 702. Although the court decided not to resolve the question of the exemption's constitutionality, it presented all the evidence to support a finding of unconstitutionality, concluding: "[I]t is reasonably clear that the 1972 exemption violates the Establishment Clause . . . ."[106] In his concurring opinion, Chief Judge Bazelon took a firmer stance than his brethren:

> I am convinced by the reasoning of part I of the court's opinion that Title VII's exemption of all "activities" of any "religious corporation, association, educational institution or society" violates the Establishment Clause of the First Amendment."[107]

The position of the court in *King's Garden* was that the 1972 amended version of section 702, by granting religious institutions broad immunity from liability for religious discrimination, gave a benefit to religious institutions not shared by secular institutions. "[T]he wholesale exemption for religious organizations alone can only be seen as a special preference."[108] The court asserted that by covering all of the "activities" of any "religious corporation, association, educational institution, or society,"

> the exemption immunizes virtually every endeavor undertaken by a religious organization. If a religious sect should own and operate a trucking firm, a chain of motels, a race track, a telephone company, a railroad, a fried chicken franchise or a professional football team, the enter-

103. Brief for Petitioners, *supra* note 43, at 7.

104. Brief for Respondents, *supra* note 45, at 9-10.

105. The court found that the FCC was "justified in finding the 1972 exemption irrelevant to its regulation of broadcast licensees under the Communications Act." 498 F.2d at 58.

106. 498 F.2d at 54 n.7.

107. *Id.* at 61.

108. *Id.* at 55.

prise could limit employment to members of the sect without infringing the Civil Rights Act.

. . . .

In creating this gross distinction between the rules facing religious and non-religious entrepreneurs, Congress placed itself on a collision course with the Establishment Clause.[109]

The court briefly analyzed the section 702 exemption in terms of the *Nyquist* test, omitting consideration of the entanglement issue since the broad hands-off policy of section 702 would produce just the opposite effect.[110] It found, first, that the purpose of the exemption was not remotely secular, pertaining as it did exclusively to religious organizations. "We cannot conceive what secular purpose is served by the unbounded exemption enacted in 1972."[111] The court noted further that the primary effect of section 702 clearly advanced religion, contrary to the proscription of *Nyquist*, by inviting "religious groups, and them alone, to impress a test of faith on job categories, and indeed whole enterprises, having nothing to do with the exercise of religion."[112]

The *King's Garden* court acknowledged that some exemption from legislative obligations was required in order to accommodate the free exercise rights of a religious institution with respect to its religious activities. But it also firmly believed that strictly secular activities of religious institutions were not entitled to constitutional protections.[113] The Court of Appeals briefly reviewed a series of establishment clause cases to support these propositions,[114] but it left to Congress the task of fashioning an alternative, constitutionally sound, exemption.[115] Prefac-

109. *Id.* at 54-55 (footnote omitted).

110. Section 702 does not require interference with, nor surveillance of, an employer's employment practices. Additionally, the broader the exemption, the less likely that a religious employer would be charged with unlawful religious discrimination. Where a formal charge is filed, there would necessarily be intervention by the EEOC and, perhaps, the courts. *Compare* Walz v. Tax Comm'n, 397 U.S. 664 (1970), where the elimination of a tax exemption could have given rise to tax valuations of church property, tax liens, tax foreclosures and the conflicts which ensue therefrom. *Id.* at 674.

111. 498 F.2d at 55.

112. *Id.*

113. *Id.*

114. Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970).

115. While it is not uncommon for courts to come very close to rewriting statutes so as to save their constitutionality, the 1972 exemption is a poor candidate for such a salvage operation. The scope of a religious exemption is an issue raising very delicate questions of public policy. While it is reasonably clear that the 1972 exemption violates the Establishment Clause, it is far less clear exactly how much, or in what way, the exemption should be narrowed to avoid First Amendment objections. There may well be a considerable range of permissible alternatives. As

ing its review with the observation that recent cases have expanded religious exemptions beyond traditionally protected boundaries, the court asserted that it could not find any precedent for the unlimited breadth of section 702.[116]

B. *Establishment Clause Analysis*

Support for the *King's Garden* position is found in an analysis of the following establishment clause cases. In *Walz v. Tax Commission*,[117] a tax exemption for church-owned property was held to be permissible "benevolent neutrality" on the part of the state.[118] The Court in *Walz* noted that the limits of state accommodation to religion do not merely encompass those rights protected under the free exercise clause; the state may, without violating the establishment clause, grant exemptions additional to those mandated by the right to free exercise.[119]

Zorach v. Clauson[120] approved a state law which permitted public school children to be released from school premises to attend—at no cost to the public—religious instructional classes. The Supreme Court found that the encouragement of religious instruction by the accommodation and cooperation of a secular institution was not only not in violation of the establishment clause, but was in "the best of our traditions."[121] And in both *Tilton v. Richardson*[122] and *Hunt v. McNair*,[123] legislation granting aid to religious educational institutions was upheld on the basis that the allotted funds would be used to construct buildings and facilities for secular purposes.

Recognizing the seeming encroachment of free exercise protection into the arena usually protected by the establishment clause, the point to be made is that the decisions in all of the above noted cases were painstakingly constructed. They clearly indicate that each step away from the historical parameters of the establishment clause was based on the unique set of facts before the Court. Each case found that the challenged legislative act had a secular purpose, a primarily secular effect;

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a matter of institutional competence and constitutional authority, it is for the Congress, not the courts, to choose among these.

498 F.2d at 54-55 n.7.

116. *Id.* at 56.
117. 397 U.S. 664 (1970).
118. *Id.* at 676.
119. *Id.* at 673.
120. 343 U.S. 306 (1952).
121. *Id.* at 313-14.
122. 403 U.S. 672 (1971).
123. 413 U.S. 734 (1973).

and only an incidental benefit to religion, all of which are in accordance with former rulings.[124] In contrast, section 702 "creates a classification of a strictly religious character. And the exemption's benefits clearly extend to the non-religious, commercial enterprises of sectarian organizations."[125] The result is a direct benefit to religious institutions and a concomitant disadvantage to non-sectarian commercial enterprises. Both the benefit and the preference are in violation of the establishment clause for impermissibly supporting religion.[126] While part II of this comment concluded that section 702 grants more free exercise protection than is constitutionally required, the foregoing analysis makes it clear that section 702 grants more free exercise protection than is constitutionally permitted.

IV. LEGISLATIVE HISTORY OF SECTION 702

The discussion in Parts I and II is distinguishable from the lack of reasoned analysis by Congress prior to the passage of the amended section 702. Although prolonged Congressional debate did occur, as an indication of legislative intent it is more extensive than instructive. It does not provide any support for finding section 702 constitutionally sound.

It was the position of Senator Williams of New Jersey that the legitimate and constitutional needs of religious institutions could be met by the application of the original section 702 with the additional coverage of section 703's bona fide occupational qualification provision.[127] The latter section would permit a religious institution to use religion as a selection criterion for positions which did not fall within the category of religious activities but for which the employer could prove that religion was a "reasonably necessary" qualification.[128] In many instances, how-

124. *See, e.g.*, Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Hunt v. McNair, 413 U.S. 734 (1973); Board of Educ. v. Allen, 392 U.S. 236 (1968); Gallagher v. Crown Kosher Super Market, Inc., 366 U.S. 617 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

125. 498 F.2d at 57 (citation omitted).

126. *See* notes 93-96 *supra* and accompanying text.

127. Section 703, 42 U.S.C.A. § 2000e-2(e) (1974), provides in relevant part:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

128. In Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), the court elaborated upon the test the employer is required to meet to successfully claim that a challenged criterion is a BFOQ. Under *Diaz*, sex, religion or national origin will qual-

ever, religion is irrelevant as a selection criterion for employment with a religious institution and, therefore section 702 should suffice. Elaborating on this position, Williams said:

> It should be emphasized that religious corporations and associations often provide purely secular services to the general public without regard to religious affiliation, and that most of the many thousands of persons employed by these institutions perform totally secular functions. In this regard, employees in these "religious" institutions perform jobs that are identical to jobs in comparable secular institutions. It seems appropriate, therefore, that these persons employed by religious corporations and associations should be given the same equal employment opportunities as those persons employed in comparable positions by secular employers.[129]

The counter-arguments of the proponents of a broad section 702 exemption were apparently more persuasive than Williams'. They were assuredly more eloquent. Plus they carried with them the influence of the reputation of one of the speakers as a constitutional scholar.[130] Senator Ervin declared:

> This section [an amended section 702 retaining the "religious activities" limitation] would split the activities of a religious organization into two segments, although they are irretrievably held mainly by the organization itself. It would be so generous to the good Lord as to permit the good Lord to retain jurisdiction over those employees of the religious organizations who did work strictly in the religious field, but it would arrogate to the Commission [the EEOC] jurisdiction of those employees of the religious organizations whose work was more of a mundane nature.
>
> When the Federal Government begins to grasp the power of things of the Lord, it is reaching a state of governmental intemperance which is alien to the first amendment. The first amendment was designed to build a wall of separation between church and state; the bill proposes to tear down, in part, that wall of separation and to give to Caesar some of the jurisdiction over the affairs of the Lord.[131]

The new section 702 was enacted into law on March 24, 1972.[132]

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ify as a BFOQ when, without the application of such a criterion, a company would be unable to perform its primary function or provide its primary service.

129. 118 CONG. REC. 1991-92 (1972). *King's Garden* took an analogous position. It went a step further, however, and asserted that section 702 appeared to be unconstitutional on fifth amendment due process clause grounds as violating the equal protection rights of secular employers. 498 F.2d at 57.

130. 118 CONG. REC. 1977 (1972).

131. *Id.*

132. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat.

V. CONCLUSION

With all due respect to Senator Ervin, his arguments reveal more rhetoric than reason. Clearly religion is a sensitive issue and government's intervention into the religious arena is suspect. The hands-off policy which led to the passage of the amended section 702 may have been politically safe, but is it constitutionally sound? Because Congress did not squarely address this issue, the dilemma will, inevitably, be passed on to the judiciary. One hopes they will render unto it the considered attention and analysis it warrants. Until they do, however, and despite aspersions recently cast its way, section 702 will remain the operable exemption for religious institutions under title VII.

Diane Nissim Wentworth

103, *amending* 42 U.S.C. § 2000e-1 (1970). The amendments to section 702, known as the Equal Employment Opportunity Act of 1972, became effective one year after the date of enactment, except for 42 U.S.C.A. §§ 2000e-2, 3, 5, 6, which became effective immediately.

THE NINTH CIRCUIT REVIEW

Because of the vast amount of important cases decided by the United States Court of Appeals for the Ninth Circuit, the Loyola of Los Angeles Law Review begins publication of the Ninth Circuit Review in this volume. In each issue a section of the Review will analyze significant cases or developments within a particularized area of the law that have occurred in the Ninth Circuit within the prior year. In this issue two cases dealing with securities regulations and one dealing with exclusionary zoning are analyzed, in order to give members of the legal profession within the Ninth Circuit a better understanding of the law as it has been decided by the Court or Appeals.

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